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IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES, :

Petitioner :

v. : No. 03-167

CARLOS DOMINGUEZ BENITEZ. :

- - - - -X

Washington, D.C.

Wednesday, April 21, 2004

The above-entitled matter came on for oral
argument before the Supreme Court of the United States at
10:06 a.m.

APPEARANCES:

DAN HIMMELFARB, ESQ., Assistant to the Solicitor General,
Department of Justice, Washington, D.C.; on behalf of
the Petitioner.

MYRA D. MOSSMAN, ESQ., Santa Barbara, California; on
behalf of the Respondent.

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P R O C E E D I N G S

(10:06 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument
now in No. 03-167, United States v. Carlos Dominguez
Benitez.

Mr. Himmelfarb.

ORAL ARGUMENT OF DAN HIMMELFARB

ON BEHALF OF THE PETITIONER

MR. HIMMELFARB: Mr. Chief Justice, and may it
please the Court:

This Court has consistently held in both
harmless error and plain error cases that an error affects
substantial rights if it affected the outcome of the
district court proceeding. Applying that principle to a
violation of rule 11 at a guilty plea proceeding, 9 of the
12 courts of appeals that hear criminal cases have
concluded that a rule 11 error affects substantial rights
if it affected the defendant's decision to plead guilty,
which means that the defendant would not have gone forward
with his plea if the error had not occurred. That
standard is correct.

The Ninth Circuit standard which the --

QUESTION: May I just ask this one question?
Because I'm -- I'm not at all sure of the -- is it
perfectly clear that the -- in terms -- effect of the

1 decision necessarily is equated to the fact he would not
2 have otherwise have pleaded guilty?

3 MR. HIMMELFARB: In the context of a guilty
4 plea, I think it is, Justice Stevens. That's the relevant
5 decision. This Court's cases have applied the harmless
6 error and plain error effect on substantial rights element
7 in a variety of circumstances: at a detention hearing,
8 during the course of a grand jury proceeding, most
9 frequently a trial, of course, and also at sentencing.
10 Each of those four circumstances, the Court made clear
11 that the relevant question was whether the effect of that
12 particular proceeding would have been the same --

13 QUESTION: Well --

14 MR. HIMMELFARB: -- if the error had not been
15 made.

16 QUESTION: Except that we -- I mean, the -- the
17 meaning of that term varies. In -- in some contexts, we
18 say, well, it's -- it's enough if -- if confidence in --
19 in that the result would have been the same has been
20 shattered. In -- in the case at the other extreme with a
21 case -- we -- I think that is strongest for you, we --
22 we've said in the ineffective assistance of counsel
23 context, yes, you've got to show that he wouldn't have
24 pleaded guilty or he's got to show that he wouldn't have
25 pleaded guilty otherwise. And -- and it seems to me that

1 the -- the issue here is, is this enough -- is the context
2 here enough like the context in ineffective assistance of
3 counsel to -- to put the heaviest burden on the
4 petitioner, or is it -- are there -- are enough
5 distinctions so that maybe the burden shouldn't be quite
6 that heavy?

7 MR. HIMMELFARB: We think the -- we think it's
8 directly analogous to the ineffective assistance of
9 counsel context. In that context, you have a deficient
10 performance by the defendant's lawyer in connection with
11 advice about a guilty plea. And this Court's decision in
12 Hill v. Lockhart makes clear that the next step of the
13 Strickland analysis, the prejudice analysis, is whether
14 but for that deficient performance, the defendant would
15 not have pleaded guilty and would have gone forward to
16 trial.

17 QUESTION: All right. No. Your -- we --

18 MR. HIMMELFARB: We think the same rule applies
19 here.

20 QUESTION: Let me -- let me suggest at least a
21 reason why maybe it isn't. I'd like your comment on it.

22 In -- in the ineffective assistance of counsel
23 context, one reason for putting a high -- you know, the
24 heaviest burden on the defendant is that it is so very
25 difficult to police effective assistance as you go along.

1 The judge watching the -- the plea hearing has no way of
2 knowing what's going on or has gone on between the lawyer
3 and -- and the client.

4 Here, we're in a different position. There --
5 there are a couple of people in a position to -- to avoid
6 the kind of problem that we've got here. One obviously is
7 the Federal judge. If he had a checklist in front of him,
8 something like this wouldn't have happened.

9 The second is counsel for the Government. The
10 counsel for the Government can get up in a case like this
11 and say, Judge, you forgot something, and avoid this
12 problem.

13 So it may be that because there are easier ways
14 to avoid this, the burden on the defendant shouldn't have
15 to be so heavy. What do you say to that?

16 MR. HIMMELFARB: Well, this Court's decision
17 makes clear in Vonn that the defendant has a burden, of
18 course, rejected the contention in that case that no
19 matter when -- regardless of the circumstances of when a
20 rule 11 error occurs, the Government bears the burden of
21 showing that there was no effect on substantial rights.
22 The holding of Vonn is that the defendant bears the
23 burden.

24 The only question in this case is what that
25 standard is, and we think again it's directly analogous to

1 the ineffective assistance of counsel context.

2 QUESTION: Well, you don't think that the
3 standard for plain error that the Court spelled out in
4 United States v. Olano provides the standard?

5 MR. HIMMELFARB: Justice O'Connor, that's
6 exactly our position. Our position is that a
7 straightforward application of Olano --

8 QUESTION: Well, if -- if that's so, Olano's
9 fourth prong, if you will, is that the error -- asks
10 whether the error seriously affects the fairness,
11 integrity, or public reputation of judicial proceedings.
12 And I'm not sure that I understand, under your test, how
13 that fourth prong would be applied or if it's still part
14 of the test.

15 MR. HIMMELFARB: It certainly is, Justice
16 O'Connor. We make two alternative arguments, one under
17 the third prong of the plain error rule, one under the
18 fourth. Our primary submission is that in order to
19 satisfy the requirement of the plain error rule -- in
20 other words, in order to show an effect on substantial
21 rights -- that's right -- a defendant has to show that the
22 error affected his decision to plead guilty.

23 Our alternative argument is that the Court --
24 even if the Ninth Circuit standard is correct so that a
25 defendant would not have to show that the error affected

1 his decision to plead guilty in order to show an effect on
2 substantial rights and he could therefore satisfy the
3 third requirement of the plain error rule, he can't
4 satisfy the fourth requirement unless he makes that
5 showing. And we think that conclusion follows from this
6 Court's decisions in Cotton and Johnson where the Court
7 assumed, without deciding, that the failure to submit an
8 element of the offense to the grand jury or the petit jury
9 affected substantial rights, but held that the defendant
10 could not satisfy the fourth requirement of the plain
11 error rule because the error had no effect on the outcome
12 of the grand jury proceeding or of the trial. So we're
13 making two alternative arguments here, one under the --

14 QUESTION: May I ask you a question about the
15 practical aspect of it? And you're asking the Court to
16 choose -- well, the plain error is what we're doing and
17 how high a burden the defendant would have to meet. But
18 this relates to a question Justice Souter asked.

19 I was surprised, given that this was not a new
20 district judge, that she didn't have a litany that would
21 cover all the rule 11 elements. And I was also surprised
22 that the Assistant U.S. Attorney didn't say at the end of
23 the colloquy, judge, you forgot to mention that this plea
24 can't be withdrawn.

25 Is there a manual that judges follow? Are U.S.

1 -- Assistant U.S. Attorneys instructed, when something is
2 left out of rule 11, to remind the judge?

3 MR. HIMMELFARB: Justice Ginsburg, my
4 understanding is that there is a bench book available to
5 judges, and obviously there are a great many district
6 judges in the United States district courts and some are
7 going to be more meticulous than others.

8 Assistant U.S. Attorneys often or at least are
9 supposed to bring checklists with them to a guilty plea
10 proceeding so that they can ensure that rule 11 is
11 strictly complied with. Of course, a prosecutor has no
12 more interest in litigating a rule 11 error on appeal than
13 anybody else does. So it's very much in the prosecutor's
14 interest to try to ensure that there's strict compliance.

15 Vonn makes clear, though, that in the event that
16 one of the -- one of the advisements slips -- and there
17 was only one here that the district judge did not give --
18 it's the defendant's burden to object and if he doesn't,
19 he's in a plain error posture on appeal, not a harmless
20 error posture.

21 QUESTION: Mr. Himmelfarb, is it -- is it clear
22 in this case that the defendant believed that he could
23 withdraw his plea? Do we know that?

24 MR. HIMMELFARB: We don't. The record is silent
25 on that question.

1 QUESTION: Do you think that -- that a defendant
2 making a guilty plea would normally believe that he could
3 withdraw it when the Government has promised him nothing
4 except that it would recommend to the judge a certain
5 sentence?

6 MR. HIMMELFARB: Well, it depends, Justice
7 Scalia. In a case like this, we think a defendant would
8 not reasonably be under that impression because in this
9 case, this -- this defendant -- respondent was repeatedly
10 advised that the judge was not bound by the guilty plea
11 and that he would face a 10-year mandatory minimum
12 sentence if the parties' recommendation was not followed.

13 QUESTION: If I was given all of that
14 information, I -- I certainly wouldn't leap to the
15 conclusion that, well, if the judge doesn't accept it, I
16 can withdraw the guilty plea. I don't know why he would
17 naturally believe that. I would think he would naturally
18 believe the opposite.

19 MR. HIMMELFARB: We agree, Justice Scalia, and
20 that's why we think --

21 QUESTION: Wasn't -- wasn't that covered in --
22 in the plea agreement itself which was translated into
23 Spanish for him, specifically that he could not -- he
24 could not withdraw his plea if the judge did not accept
25 the plea?

1 MR. HIMMELFARB: That -- that's exactly right,
2 Mr. Chief Justice.

3 QUESTION: Your basic point is that this part of
4 the rule is pointless.

5 MR. HIMMELFARB: Not at all, Justice Stevens.

6 QUESTION: Well, I guess that's Justice Scalia's
7 point.

8 MR. HIMMELFARB: No. There may --

9 (Laughter.)

10 QUESTION: I'm sorry.

11 MR. HIMMELFARB: My point is that in a case like
12 this where a defendant is advised that the judge is not
13 bound by the parties' agreement, it's probably not
14 reasonable for that defendant to assume that he can
15 withdraw his plea if the judge doesn't follow the --

16 QUESTION: My point is not that it's pointless.
17 My point is that when it is omitted, it does not
18 necessarily produce substantial injustice. It's a good
19 idea to give it, of course. But in the absence of giving
20 it, I would think that normally you'd think that he would
21 assume that anyway.

22 MR. HIMMELFARB: That's exactly right. That's
23 our position, Justice Scalia.

24 QUESTION: But if that's right and I were a
25 district judge, I could probably save time by just

1 omitting this regularly then.

2 MR. HIMMELFARB: No, Justice Stevens, I don't
3 think that's likely to happen. District judges are
4 generally quite conscientious about complying with rule
5 11. Prosecutors are generally quite conscientious about
6 making sure that district judges comply with rule 11.
7 Nobody has an interest in having appellate litigation over
8 rule 11 errors. Everyone has an interest -- everyone has
9 an interest in making sure that rule 11 is strictly
10 complied with so that the judgment of conviction can be
11 entered and people can move on to other business. So I
12 don't think --

13 QUESTION: Even -- even respondent doesn't argue
14 here that any omission from the rule 11` requirement
15 produces an automatic reversal. Does respondent argue
16 that?

17 MR. HIMMELFARB: No. My --

18 QUESTION: So, I mean, that's -- that's not the
19 theory here, that if you don't -- if you don't produce an
20 automatic reversal, people won't give the rule 11
21 requirements.

22 MR. HIMMELFARB: That's right. The Ninth
23 Circuit does not have a rule of automatic reversal. The
24 Ninth Circuit standard is if the error is not minor or
25 technical and the defendant wasn't otherwise aware of the

1 omitted information, he shows an effect on substantial
2 rights.

3 Our position is that knowledge of the omitted
4 information is a sufficient condition to defeat a claim
5 that there was an effect on substantial rights, but it's
6 not necessary.

7 QUESTION: Now, is knowledge of requirement a
8 wholly subjective test? We -- we want to know what this
9 defendant thought. Or is it what a reasonable person
10 would have concluded based on all of the circumstances?

11 MR. HIMMELFARB: It's a subjective standard,
12 Justice Kennedy. In the context of a guilty plea, when
13 the question is whether the error affected the defendant's
14 decision to plead guilty, the relevant question is whether
15 this particular defendant would have pled -- would have
16 gone to trial.

17 QUESTION: So you put him on the stand. You put
18 him on the stand and --

19 MR. HIMMELFARB: No, you don't. You can't
20 because by definition in the plain error/harmless error
21 context, you're limited to the record on appeal.

22 Objective considerations are obviously relevant
23 in making the subjective determination of whether this
24 particular defendant would have pled guilty.

25 QUESTION: Well, you're limited to the record on

1 appeal. Could there have been a hearing in the -- in the
2 district court on the rule 11 --

3 MR. HIMMELFARB: There could, Justice Kennedy.
4 For example, if the defendant had moved to withdraw his
5 plea after he pled but before sentencing, it might have
6 been within the district court's discretion to hold a
7 hearing and you could have had the defendant testify at
8 that hearing.

9 QUESTION: But after sentence, it's impossible
10 for him to testify?

11 MR. HIMMELFARB: That's right. Under -- under
12 rule 11, a defendant can move to withdraw his plea for any
13 reason before it's accepted.

14 QUESTION: But he didn't do that. This question
15 wasn't raised until appeal -- the appeal. He didn't
16 say --

17 MR. HIMMELFARB: That's exactly right. It
18 wasn't raised at any point in the district court, Justice
19 Ginsburg.

20 QUESTION: But -- but my question is in -- in
21 other cases it would not be possible to put him on the
22 stand at any time after sentencing.

23 MR. HIMMELFARB: No. After sentencing, the rule
24 makes clear a defendant can't move to withdraw his plea.
25 The only way he can attack his plea is by direct appeal or

1 a collateral attack. But before sentencing it's --

2 QUESTION: On collateral attack, could he take
3 the stand?

4 MR. HIMMELFARB: Sure. It would be within the
5 discretion of the district judge and his willingness to
6 testify.

7 QUESTION: Under your --

8 QUESTION: Can you --

9 QUESTION: Excuse me.

10 QUESTION: Can you collaterally attack a plea
11 before you appealed and sought to have it set aside?

12 MR. HIMMELFARB: No, Mr. Chief Justice. There's
13 -- there's, of course, a requirement that you file a
14 direct appeal. Otherwise you will have procedurally
15 defaulted.

16 I should also say that this Court held in
17 Timmreck that a formal violation of rule 11, which is all
18 that we have here, is not cognizable in a 2255 proceeding.

19 QUESTION: Normally -- you may know -- I'm just
20 drawing on your background. Normally when you say did it
21 affect somebody's substantial rights, when I see those
22 words, I think the judge did something to this person.
23 And when I say did it affect his substantial rights, I
24 think, well, did it matter in terms of what the judge or
25 the jury did to him. Now, is that a correct way to think

1 about it? Are there other instances where substantial
2 rights means something different than that?

3 MR. HIMMELFARB: In the ordinary context, the
4 relevant decision-maker is, of course, the judge, and
5 the --

6 QUESTION: No, I'm not talking about -- I'm
7 saying something happened to this human being who is there
8 in court, and when I say did this affect his substantial
9 rights, I usually ask myself did this error make a
10 difference in terms of what happened to him. That's how I
11 -- it's very colloquial, but that's the question I
12 normally ask myself. Now, maybe all these years I've been
13 doing it wrong or maybe there's some circumstances where I
14 should ask that question. You know, like a death case,
15 which is a horrible case, sometimes there's harmless error
16 and usually the question there is did it matter in terms
17 of his being sentenced to death. Those come up a lot.

18 I'm just asking you a general question. I don't
19 have a point here. I'm trying to figure out how best to
20 think about this.

21 MR. HIMMELFARB: No. We think your formulation
22 is exactly the right way to think --

23 QUESTION: Fine. If that is the correct
24 formulation, can you think of other instances in the
25 criminal law where substantial rights meant something

1 other than this formulation?

2 MR. HIMMELFARB: I can. The -- an affect on
3 substantial rights means that there's an affect on the
4 outcome.

5 QUESTION: That's my question. I'm asking it to
6 inform myself and I have the same question for the other
7 side too.

8 MR. HIMMELFARB: Let -- let me qualify that --
9 that answer if I could, Justice Breyer. That is the
10 general rule. There are, of course, certain types of
11 error, as this Court has made clear, which do not require
12 a showing of --

13 QUESTION: Like structural error. That's one
14 kind of exception.

15 MR. HIMMELFARB: That's exactly right.

16 QUESTION: But I don't think we normally speak
17 in terms of substantial rights in those cases. Maybe we
18 do. I don't know.

19 MR. HIMMELFARB: Well, sometimes the question
20 will be whether the third requirement of the plain error
21 rule, which is a substantial rights requirement, has been
22 affected.

23 QUESTION: All right. So -- so structural error
24 cases are an instance where my colloquial question is not
25 right and nobody claims here this is a structural error

1 case.

2 MR. HIMMELFARB: We certainly don't, Justice
3 Breyer. I -- I don't believe respondent does, and the
4 court of appeals did not take that position either.

5 QUESTION: Mr. Himmelfarb, there's -- there's
6 another specific about this case that might have averted
7 what happened. The -- the entire plea agreement was read
8 to the defendant in translation because he didn't speak
9 English. And that was the day before. If it had been the
10 practice to give him a copy of the translation, instead of
11 just having him hear it orally, then it would have --
12 might better for him to read and we would have had more
13 security that he knew.

14 MR. HIMMELFARB: Justice Ginsburg, I don't know
15 as an empirical matter which is more likely to ensure that
16 a defendant is aware of what's in the plea agreement,
17 sitting down with a lawyer and a Spanish interpreter as
18 happened here and having the three of them go over the
19 plea agreement, having the Spanish interpreter translate
20 it for the defendant in the presence of counsel so that
21 the defendant can ask any questions of counsel that are
22 necessary and counsel can answer them, on the one hand, or
23 the suggestion which you just made.

24 QUESTION: But I meant both, that is, that there
25 would be the written -- written-out plea agreement, which

1 if he could read English, he could have read, and then the
2 lawyer and the translator go over that written document
3 with him, that that I think would be more effective than
4 just hearing it orally.

5 MR. HIMMELFARB: Again, I'm not sure whether
6 that's true as an empirical matter. As a legal matter,
7 the question here is when a defendant has forfeited a
8 claim of error and he has to show an effect on substantial
9 rights on appeal, if you have --

10 QUESTION: But I didn't mean this to be legally
11 dispositive. It's in the same way -- how could this be
12 warded off so we don't get a Federal case out of these
13 rule 11 slips.

14 MR. HIMMELFARB: Again, Justice Ginsburg, I -- I
15 don't think it's ordinarily the practice of U.S.
16 Attorney's offices to provide Spanish translations of plea
17 agreements to Spanish speakers who don't speak English.
18 It's always the practice, whether the translator is at --
19 comes at the defendant's expense or the court's expense,
20 for a translator to translate the plea agreement for the
21 defendant in -- in the presence of counsel. I -- I don't
22 know what would be the source of any requirement for the
23 Government to provide a Spanish --

24 QUESTION: I -- I wasn't suggesting that -- that
25 it was a requirement.

1 May -- may I ask just one more puzzling thing
2 about this case, background of it? The reason that the
3 deal didn't -- wasn't possible was that this man had three
4 priors instead of everybody thought -- well, at least the
5 judge thought or the prosecutor thought, until the
6 presentence report, there was only one. But the defendant
7 must have known how many priors he had.

8 MR. HIMMELFARB: That's right. The defendant,
9 of course, knew that he had three prior convictions and
10 not just one. I'm not sure what bearing that fact has on
11 the plain error analysis in this case because it's not
12 just the fact of the prior convictions that would have
13 rendered this defendant ineligible for a sentence below
14 the mandatory minimum. There has to be a guidelines
15 calculation and assignment of criminal history points to
16 each conviction, and if you get above one criminal history
17 point, you're not eligible for a sentence below the
18 mandatory minimum. So you would --

19 QUESTION: Well, you might -- you might say that
20 the fact that the defendant must have known that he had
21 three priors would have made him realize that the plea
22 agreement probably wouldn't be accepted.

23 MR. HIMMELFARB: One could reasonably conclude
24 that he should have had substantial doubt about whether he
25 would have been eligible for the --

1 QUESTION: Are you assuming he understood the
2 sentencing guidelines in that detail?

3 MR. HIMMELFARB: No. That's --

4 QUESTION: It'd be rather unusual. The basic
5 problem here is we're dealing with dumb defendants.

6 (Laughter.)

7 QUESTION: That's the problem. That's why you
8 have to tell them twice.

9 MR. HIMMELFARB: Well, that's true, Justice
10 Stevens.

11 QUESTION: Yes.

12 MR. HIMMELFARB: Rule 11 imposes a requirement
13 on the district judge to advise the defendant of his
14 rights. Nobody disputes that that didn't happen here for
15 one of the advisements and nobody disputes that there was
16 therefore rule 11 error. Nor does anybody dispute that it
17 was a plain error. But since defendant didn't object --
18 respondent didn't object in the district court, we're in a
19 plain error posture. That is a difficult standard to
20 meet. He has to show not only that there's an error
21 that's plain, but he has to satisfy these two other
22 requirements that I'll mention.

23 QUESTION: Why shouldn't it be as an objective
24 test, do you think? I don't know why you focus on -- on
25 something else. I mean, can't we assess whether -- in

1 determining whether it affects substantial rights, how the
2 evidence against the defendant was, what the benefits of
3 the plea were, and what he was told in just objective
4 terms?

5 QUESTION: In other words, reasonable
6 probability.

7 QUESTION: Yes. I mean, why do you want to make
8 it something else?

9 MR. HIMMELFARB: Justice O'Connor, it is
10 absolutely the case that in undertaking this analysis, a
11 court should and ordinarily will look at objective
12 factors. In most cases --

13 QUESTION: I would think you would win under an
14 objective test. I don't know why you're trying to urge
15 something else.

16 MR. HIMMELFARB: We think that -- we agree that
17 we win under either an objective or a subjective standard,
18 given the strength of the case against respondent and
19 given the fact that he received a substantial benefit from
20 pleading. We think that a -- a subjective test is the
21 appropriate one because this is not a situation like you
22 have when there's trial error and you have to determine
23 whether the jury objectively would have reached the same
24 decision --

25 QUESTION: But -- but if you're doing a

1 subjective test, you might as -- as long as you're doing
2 that, why not accept the Ninth Circuit test: did he know?

3 MR. HIMMELFARB: Well, Justice Kennedy, we think
4 that if he did knew -- if he did know, that's a sufficient
5 basis for rejecting his claim because if he knew, the fact
6 that the judge didn't tell him a second time --

7 QUESTION: No, no. I -- I thought that this was
8 the Ninth Circuit test that you disagree with. And my --
9 my point is if you're going to go this objective route,
10 you might as well ask the basic question as the Ninth
11 Circuit did.

12 MR. HIMMELFARB: We -- we have no problem with
13 the question Ninth Circuit asks. Our problem is that they
14 stopped after they asked that question. That should
15 probably be the first question. If there's evidence in
16 the record that the defendant was otherwise aware of the
17 omitted rule 11 information, it would be very difficult to
18 say that he would have gone to trial if the judge had
19 omitted to say something that he already knew. That's why
20 we think that's a sufficient --

21 QUESTION: I still would like to understand why
22 you think an objective test is not acceptable.

23 MR. HIMMELFARB: In -- in the -- when a
24 defendant is confronted with a choice of pleading guilty
25 or going to trial, he has -- he, of course, has an

1 absolute right to go to trial. No matter how strong the
2 evidence is against him, no matter what benefits he could
3 get from pleading guilty, if he chooses, for whatever
4 personal or idiosyncratic reason, to go to trial despite
5 those things, he's got the right to do it. That's why we
6 think --

7 QUESTION: Maybe -- maybe you think the courts
8 would not -- would not stand by an objective test in the
9 situation where the facts are such that any intelligent
10 defendant would have -- would have made the plea even if
11 he knew that it couldn't be revoked. But this particular
12 defendant, for whatever reason -- and it's clear on the
13 record he told his counsel or he left -- left a note and
14 said, well, there's no harm in making this plea because I
15 can always withdraw it if the judge doesn't go along with
16 the recommended sentence. And in that situation, I think
17 it's very hard for a court to say, oh, yes, a -- since a
18 reasonable defendant would -- would have gone ahead
19 anyway, this -- this defendant who would not have gone
20 ahead anyway must be held to his guilty plea.

21 MR. HIMMELFARB: I think that's right.

22 Let me -- let me just add this point to what
23 I've already said. While the objective question of
24 whether a reasonable defendant in the defendant's
25 circumstances would have pleaded is not, we think, the

1 correct analysis under the third component of the plain
2 error rule, we do think it could be taken into account in
3 connection with the fourth requirement, which is the
4 discretionary component.

5 So, in other words, if you have a situation
6 where a defendant for some idiosyncratic reason was intent
7 on going to trial, even though it was essentially suicidal
8 for him to do that, he might be able to satisfy the third
9 requirement because it affected his decision to plead
10 guilty, but a court could permissibly say, that doesn't
11 serious affect the fairness, integrity, and public
12 reputation of judicial proceedings because he undoubtedly
13 would have been convicted if he had gone to trial and
14 would have gotten a longer sentence.

15 I'd like to reserve the balance of my time for
16 rebuttal.

17 QUESTION: Very well, Mr. Himmelfarb.

18 Ms. Mossman, we'll hear from you.

19 ORAL ARGUMENT OF MYRA D. MOSSMAN

20 ON BEHALF OF THE RESPONDENT

21 MS. MOSSMAN: Mr. Chief Justice, and may it
22 please the Court:

23 I have three points to make.

24 First, Olano created a framework that the lower
25 courts have been consistently applying -- applying in

1 evaluating forfeited errors in a rule 11 context for 11
2 years.

3 Second, now having suffered an adverse ruling in
4 a fact-specific case, the Government is urging this Court
5 to adopt a strict, heavy burden, bright line, but-for
6 prejudice test in every case that eliminates the lower
7 court's flexibility.

8 Third, not only is the Government's test
9 incorrect, but the Ninth Circuit cited and applied Olano
10 and was consistent with Olano in Benitez.

11 Now, first, the Olano standard is a national
12 standard under plain error review where an error affects
13 the substantial rights. And that means -- generally is
14 taken to mean it's prejudiced. And in most cases
15 prejudice means that it affects the outcome of the
16 proceedings. In Benitez, this is what the Ninth Circuit
17 held as well because in Benitez, if it's not minor or
18 technical, that means it's prejudicial.

19 QUESTION: Why?

20 QUESTION: But that's not so.

21 QUESTION: Has -- has --

22 QUESTION: I mean --

23 MS. MOSSMAN: Or consistently can be --

24 QUESTION: I read the Ninth Circuit. It seemed
25 to me we said just what you said we said. What the Ninth

1 Circuit says is Benitez must prove that the error was not
2 minor or technical, which by the way, has nothing to do
3 with it because a minor or technical error could well
4 affect the outcome. And then it says, and that he did not
5 understand the rights at issue, which again is a necessary
6 but not sufficient condition.

7 Now, where did they say anything about
8 substantial rights? They used those words, but if
9 substantial rights means what I -- we just discussed,
10 which I'd like your view about, they never talked about
11 substantial rights.

12 MS. MOSSMAN: They don't talk about
13 substantial --

14 QUESTION: Well, didn't they say just what I
15 read?

16 MS. MOSSMAN: Yes, but if --

17 QUESTION: So why isn't it like summary reverse?
18 We said this. You say that.

19 MS. MOSSMAN: Well, it's -- we -- we see that
20 not minor or technical means it has -- it affected his
21 substantial rights, and they actually cite to Olano.

22 QUESTION: Oh, I see. Now, then what does
23 affect substantial rights mean? Now, we have an error
24 here that's not minor or technical.

25 MS. MOSSMAN: Correct, and --

1 QUESTION: Now he, in fact -- let's say second
2 -- did not understand that he had a right to withdraw.

3 MS. MOSSMAN: Correct.

4 QUESTION: Now, is that the end of the thing?

5 MS. MOSSMAN: No, they -- then --

6 QUESTION: Ah, ah, where -- that's -- that's the
7 point. Where in this opinion does it say that's not the
8 end of the matter?

9 MS. MOSSMAN: Well, they do go to fourth prong.
10 They --

11 QUESTION: No, no, not the fourth prong. Where
12 does it say that's not the end of the matter under the
13 third prong?

14 You see, I could have a nontechnical matter.
15 Correct?

16 MS. MOSSMAN: Correct.

17 QUESTION: I could -- it could have affected my
18 understanding, but it might be that I would have pled
19 guilty anyway.

20 MS. MOSSMAN: Well, I think --

21 QUESTION: That's what's worrying me.

22 MS. MOSSMAN: But --

23 QUESTION: And the most obvious case is where
24 the judge gives me the sentence I hoped for.

25 MS. MOSSMAN: That is the obvious case, Justice

1 Breyer, and that was Chan and they cite to that in Benitez
2 where they got exactly the sentence that they bargained
3 for. Therefore, the error is not minor or technical.

4 QUESTION: Oh, I'm sorry. A terribly minor,
5 terribly important error, terribly important. Indeed, the
6 judge has a whooping cough fit and nothing comes out of
7 his mouth, but he gives them the sentence he asks for.
8 Okay?

9 MS. MOSSMAN: Yes.

10 QUESTION: What about that?

11 MS. MOSSMAN: Well, I think what's coupled here
12 is that it has to be knowing. There has to be a
13 knowingness and a voluntariness. And in that situation,
14 if the -- if the defendant knew that he was possibly --
15 that the sentence that he bargained for was --

16 QUESTION: No. The -- he knew nothing. The
17 defendant knew nothing. It was a major error. He just got
18 what he asked for.

19 MS. MOSSMAN: We believe that is consistent. He
20 -- he got what he -- if the sentence is less than he -- or
21 got the sentence that he bargained for, where is the
22 error?

23 QUESTION: Of course.

24 MS. MOSSMAN: But the --

25 QUESTION: Of course. That's what's bothering

1 me.

2 MS. MOSSMAN: Because we're --

3 QUESTION: If in fact the major error -- and he
4 did not understand it -- made no difference to the
5 outcome, then, says the Government, he shouldn't be able
6 to appeal it. And that's the problem. As I read the
7 Ninth Circuit, they didn't make that last statement.

8 MS. MOSSMAN: So if the --

9 QUESTION: And they want an -- do you agree with
10 them that they should have an opportunity to go back and
11 to say, judge, we want this client also to be able to show
12 it made no difference to the outcome? If you agree with
13 that, that's the end of the case I think.

14 MS. MOSSMAN: Justice Breyer, if they -- if it's
15 a major rule 11 error, it would not be minor or technical.
16 The analysis would -- would address that fact.

17 QUESTION: Well, how -- how do you know, just
18 from reading rule 11, which errors are minor and technical
19 and which aren't?

20 MS. MOSSMAN: We don't believe all errors in
21 rule 11 --

22 QUESTION: How do you -- how do you -- what's
23 your standard for telling the difference?

24 MS. MOSSMAN: Well, we think -- Congress has
25 enacted this and the full panoply of errors --

1 QUESTION: Panoply.

2 MS. MOSSMAN: -- of rule 11 advisements are
3 important, and none them can be considered minor or
4 technical --

5 QUESTION: So --

6 MS. MOSSMAN: -- in and of themselves.

7 QUESTION: But just a moment ago, you said not
8 every rule 11 violation is necessarily not minor or
9 technical. You say it's -- you -- I thought you intimated
10 some of the could be.

11 MS. MOSSMAN: It's part of the analysis. I
12 think you have to complete the analysis.

13 QUESTION: Well, but I'm trying to get you to
14 answer a rather specific question. How do you define
15 minor or technical?

16 MS. MOSSMAN: Well, I think that was brought out
17 in actually the advisory committee notes. So, for
18 instance, if the -- if the judge failed to advise the
19 defendant that if he lies on the stand, he'd be subjected
20 to perjury charges. That's considered not a minor or --
21 that's considered basically a minor or technical
22 advisement.

23 Also, if there was -- the judge failed to cite
24 to an elements of the offense, but the defendant
25 demonstrated that he specifically knew about that, that

1 would not be considered minor or technical.

2 If the judge misstates a -- the maximum
3 sentence, but the defendant receives a sentence that's
4 substantially lower, that was considered under the
5 advisory committee notes basically --

6 QUESTION: Did the -- did the advisory committee
7 purport to cover all possible minor or technical errors?

8 MS. MOSSMAN: They were just giving -- it was
9 illustrative I believe.

10 QUESTION: Examples.

11 MS. MOSSMAN: Yes.

12 QUESTION: In -- in assessing how weighty this
13 particular lapse is, should we take into account that as
14 far as I know, this defendant has never said in the
15 district court or on appeal that he indeed wants to go to
16 trial.

17 MS. MOSSMAN: It's our position that I wouldn't
18 be here if he didn't want his plea vacated.

19 QUESTION: But he -- on -- on -- the plea
20 vacated is one thing.

21 MS. MOSSMAN: Well, we --

22 QUESTION: Because then you have -- given that
23 he has three priors, his sentence -- he was sentenced at
24 the mandatory minimum. How much better could he do on a
25 resentencing? So it's got to be he wants to go to a trial

1 because do you agree that if we -- if we just say new
2 sentencing, he couldn't do any better given --

3 MS. MOSSMAN: Justice Ginsburg, it's our
4 position that this particular defendant at every single
5 proceeding, he -- he expressed his dissatisfaction with
6 his counsel, and the respondent's second letter to the
7 court, which is at the joint appendix, number 96, was
8 exactly -- could be construed, because it was a pro se
9 filing, as a motion to withdraw. He asked for new counsel
10 to look at his case anew.

11 QUESTION: But that's not the question I asked
12 you. I asked did he ever say at any stage, judge, I'd
13 like to have a trial. I want to plead not guilty.

14 MS. MOSSMAN: Justice Ginsburg, after the
15 conference on the substitution of hearing, a sentencing
16 date was -- was set, and this particular defendant did not
17 object to the -- to a trial date -- excuse me -- a trial
18 date was set, and this particular defendant did not
19 object. His attorney made some comments about maybe it's
20 not necessary.

21 QUESTION: It's not -- one thing not to object
22 to a setting of a trial date, but did this man ever say I
23 want to exercise my right to trial by jury?

24 MS. MOSSMAN: His first statement to the court
25 at that substitution of -- of counsel hearing was at no

1 time have I decided to go to trial. But that's not
2 conclusive. He needed more --

3 QUESTION: I thought he was stronger than that.
4 I thought -- thought he had said at one point I don't want
5 to go to trial.

6 MS. MOSSMAN: He never said that specifically or
7 definitively. He said at no time have I decided not --

8 QUESTION: But in any case, if he -- if -- but
9 his concern is that his substantial rights or -- have been
10 violated. And the possible effect on the outcome is
11 relevant. And my question is how could the outcome be
12 affected if he got the mandatory minimum? He got the
13 lowest sentence that the law allowed the judge to impose.
14 So unless he wants to go to trial, he isn't harmed by what
15 happened. And so I'm asking if there's any stage where he
16 said, I want to go to trial.

17 MS. MOSSMAN: This particular defendant made
18 requests of his attorney that were not brought to the
19 court's attention. He acted pro se in -- in three
20 instances. We -- the record is actually void to know if
21 he -- and he was actually silenced when he wanted to ask
22 this -- the judge questions at his change of plea hearing.
23 He said I was asked -- I wanted to ask the judge questions
24 and I was silenced. So the record is actually void
25 specifically to answer your question. We don't --

1 QUESTION: What was -- what was the evidence in
2 the case? What was the evidence against him? What --
3 what did the Government have?

4 MS. MOSSMAN: Basically his own confession and
5 two co-defendants. He was caught by -- basically the deal
6 went down through a confidential informant.

7 QUESTION: Would -- would anybody in his right
8 mind have wanted to go to trial?

9 MS. MOSSMAN: In our opening brief --

10 QUESTION: And risk getting more than the
11 mandatory minimum?

12 MS. MOSSMAN: In our opening brief, we
13 completely briefed out the defense of entrapment, and this
14 is brought out through the -- the language of this
15 defendant through the three letters that were submitted to
16 the court through his own pro se actions. We believe that
17 he had a possible defense of entrapment. I was not his
18 trial attorney. So --

19 QUESTION: But you -- you have looked at the
20 cases on entrapment.

21 MS. MOSSMAN: Yes.

22 QUESTION: And if you've got a predisposition,
23 you don't have much of a prayer on an entrapment claim.

24 QUESTION: And he had three priors. Were --
25 were the three priors of the same -- same line of

1 commerce?

2 MS. MOSSMAN: No, they were not. No, they --
3 they were not, Justice Scalia.

4 QUESTION: If -- if you were to prevail and he
5 were to have a trial and be convicted, could he get a more
6 lengthy sentence or would that raise problems of
7 vindictive prosecution? Would failure to accept
8 responsibility be a ground for an increase?

9 MS. MOSSMAN: I don't think that would be fair.
10 He has a fundamental right to go to trial.

11 QUESTION: That's not --

12 MS. MOSSMAN: Also, the --

13 QUESTION: My question is can he get -- if he
14 gets a new trial, can he get an increased sentence?

15 MS. MOSSMAN: It's possible, but -- it's
16 possible, Your -- Justice Kennedy.

17 QUESTION: There's -- there's no vindictive
18 prosecution problem?

19 MS. MOSSMAN: There possibly is. I mean, I --
20 he would not get the acceptance of responsibility points,
21 but that -- but the acceptance of responsibility points
22 doesn't make the -- the bottom line here because of the
23 mandatory minimum. So he still would be looking at a 10-
24 year mandatory minimum, even if he went to trial, and
25 often defendants that go to trial on these drug

1 convictions do get the mandatory minimum, irregardless if
2 they have gone to trial or -- and even irregardless if
3 they don't get the acceptance of responsibility points.

4 QUESTION: Let me -- let me ask you this
5 question. You argue for a subjective test in a context in
6 which the defendant can't take the stand to say what his
7 understanding was. That doesn't make a lot of sense to
8 me.

9 MS. MOSSMAN: Well, defendants plead guilty for
10 all types of reasons. We don't know what's in the mind of
11 defendants.

12 QUESTION: No, no. But you're saying that you
13 want to subjective test. You want -- you want to defend
14 the Ninth Circuit which said the question is whether or
15 not he knew that he had this specific burden, that he was
16 waiving the specific right the minute he entered the plea.
17 And you want a -- a test to say that he didn't, in fact,
18 know that. And yet, we can't put him on the stand. That
19 -- that seems to me an odd test.

20 MS. MOSSMAN: Well --

21 QUESTION: An odd -- an odd way to run the
22 system.

23 MS. MOSSMAN: I think it's important to see if
24 the -- this implicates the constitutional principles under
25 the Due Process Clause. It has to be a knowing and

1 voluntary plea. That is a subjective test. That's sort
2 of built into the rule 11 --

3 QUESTION: But the Ninth Circuit didn't follow
4 -- didn't find that his plea was involuntary in a
5 constitutional sense.

6 MS. MOSSMAN: Excuse me, Chief -- Mr. Chief
7 Justice. They did under the fourth prong of Olano. They
8 -- the actual citation would have been he did not
9 understand the -- the consequences of his plea, which is
10 therefore not voluntary.

11 QUESTION: Did -- did they say it was a
12 constitutionally invalid plea?

13 MS. MOSSMAN: They cited to Graibe.

14 QUESTION: Ms. Mossman, you've been asked
15 questions by several different members of the Court and
16 you don't seem to really respond to the questions. I'm
17 asking you a very specific question now.

18 MS. MOSSMAN: Yes, Your Honor. They cited to
19 Graibe with cites to the Constitution.

20 QUESTION: I'm rather confused because are --
21 where -- there -- there are two kinds of questions we've
22 been discussing. One is whether in fact, if he had been
23 told specifically, what he was supposed to be told, he
24 would then have withdrawn his guilty plea. That's
25 question one. And most of what we've been talking about

1 is that.

2 But I thought we're actually here to ask a
3 different question and the different question is I thought
4 the Ninth Circuit -- and I did think that from reading its
5 opinion -- said what we've just been discussing has
6 nothing to do with the matter.

7 MS. MOSSMAN: Yes.

8 QUESTION: All that -- all that the person has
9 to show is that he didn't understand his rights. Now,
10 what do you think about that question?

11 MS. MOSSMAN: I think, Justice Breyer --

12 QUESTION: So let's assume -- it's absolutely
13 clear. They can come in with 52 bishops who are prepared
14 to swear that if he had understood everything perfectly,
15 he nonetheless would have gone ahead and pled guilty. But
16 it's also clear he did not understand his rights. Okay?

17 MS. MOSSMAN: Yes.

18 QUESTION: What's supposed to happen?

19 MS. MOSSMAN: If he -- is he alleging a rule 11
20 violation?

21 QUESTION: Oh, there -- look, what happened was
22 the judge never told him that you're stuck with your plea
23 if I don't give you what you think you're going to get.
24 He never told him that. It's clear in rule 11 he was
25 supposed to. And now, in addition, we know for sure that

1 this person didn't understand that. But we also know for
2 sure it made not one whit of difference to his plea.
3 What's supposed to happen?

4 MS. MOSSMAN: Justice Breyer, this is -- I
5 believe you're talking about a motivated pleader, a
6 pleader that was --

7 QUESTION: I'm talking what I think is about
8 this case.

9 MS. MOSSMAN: This case.

10 QUESTION: Yes. I think as it's presented in
11 the questions presented and in the opinion that was
12 written by the Ninth Circuit. Now, I might be wrong and
13 you could explain to me why I'm not. But -- but in any
14 case, if you think that might be this case that's
15 presented here, I -- in the Ninth Circuit opinion, I'd --
16 I'd like an answer or your best answer.

17 MS. MOSSMAN: I -- Justice, if I can answer your
18 question, it's the -- a defendant that's caught in the
19 justice -- a criminal justice labyrinth and he -- he
20 doesn't understand, he doesn't understand the language,
21 he's not confident in his counsel, and he believes he can
22 withdraw his plea. Is that correct?

23 QUESTION: Yes. But in fact, we know he never
24 would have. We know it for sure.

25 MS. MOSSMAN: But he -- he should --

1 QUESTION: He's written secret letters to his
2 relations --

3 (Laughter.)

4 QUESTION: -- and whatever. Do it in any sort
5 you want, but -- but I mean, that's -- that's a little bit
6 of a technical matter here. But I did think in reading
7 the Ninth Circuit opinion and reading the Government's
8 brief, that that's what they're worried about, that there
9 could be cases where he does not understand the nature of
10 that rule 11 right, but nonetheless it makes no difference
11 to his decision to plead guilty.

12 So that -- that's a bit of a technical point
13 here, I agree. But as I read the Ninth Circuit, I
14 thought, well, that's what's going on in this case. Now,
15 you could explain to me, if you want, that I'm completely
16 out to lunch, so to speak.

17 MS. MOSSMAN: Well, Justice Breyer, if he was
18 motivated to plead guilty and there was an error in the
19 rule 11 colloquy and he had the opportunity to replead, he
20 could replead to another type of plea agreement, a C plea
21 agreement. He could ask for different provisions within
22 that -- that plea agreement, for instance, less supervised
23 release. He could ask for a type C plea agreement.

24 QUESTION: Why -- why would they give him a
25 better deal the second time around? I mean, they'd say,

1 you know, okay, we forgot to tell you that you couldn't
2 withdraw it. We now tell you you can't withdraw it. And
3 we offer you the same deal we offered you last time. Why
4 -- why would he get a better deal?

5 MS. MOSSMAN: Well, he would -- if he's
6 motivated to plea --

7 QUESTION: In fact, they might -- they might be
8 mad at him for having backed out and -- and not give him
9 as good a deal. But I can't imagine that he'd -- he'd get
10 a better deal the second time around.

11 MS. MOSSMAN: Justice Scalia, I believe he would
12 have an opportunity to renegotiate or he could be
13 repleading to the -- and have confidence in the process.

14 QUESTION: What leverage does he have? What
15 leverage does he have when he's face with a mandatory
16 minimum that he can't escape from and that's what he's
17 got? I -- I can't -- could you describe for this
18 defendant what that better deal would be?

19 MS. MOSSMAN: Justice Ginsburg, it possibly
20 could be less time on supervised release, less time -- or
21 -- or actually a type C plea agreement instead of the type
22 plea agreement. You're correct in saying they might not
23 offer him that type, but 95 percent of criminal -- Federal
24 criminal convictions go by way of guilty pleas. So
25 they're going to offer him something.

1 QUESTION: But how could -- could he escape from
2 the mandatory minimum in any way other than what they
3 thought might work here, this so-called safety valve?

4 MS. MOSSMAN: The mandatory minimum just becomes
5 the bottom line then.

6 QUESTION: And that's what he got, and that's
7 why I can't understand any better deal that this defendant
8 might have received.

9 MS. MOSSMAN: Well, Justice Ginsburg, he could
10 have confidence in the plea proceeding if it was -- if he
11 was given the full panoply of his --

12 QUESTION: You'd do it all over again with the
13 same bottom line, but he's going to feel better about it
14 the second time?

15 MS. MOSSMAN: Possibly, yes. I mean, maybe that
16 means something to this motivated pleader.

17 QUESTION: Well, I'd like to ask you a question
18 that I asked Mr. Himmelfarb and that it seemed puzzling to
19 me that the safety valve which everyone hoped would allow
20 a sentence below the mandatory minimum could never work
21 from day one because he had two additional prior offenses.
22 Now, if anyone knew about those priors, which were under a
23 different name, which is why they weren't found
24 immediately, certainly the defendant knew.

25 MS. MOSSMAN: Yes, Justice Ginsburg, the

1 defendant knew, but it was confirmed on the record by the
2 district court judge that he actually fully disclosed to
3 his attorney his priors. This was brought out in the
4 record at the sentencing hearing, and the judge confirmed
5 this. And so to talk about --

6 QUESTION: So his -- his attorney knew that he
7 was disqualified for this plea?

8 MS. MOSSMAN: This -- it was confirmed. The
9 defendant said I completely disclosed everything to my
10 attorney. I -- I don't understand what's going on. The
11 points weren't explained to me. The safety valve wasn't
12 explained to me. This was brought out in the sentencing
13 transcript that -- that his priors were confirmed.

14 QUESTION: That they were confirmed, but at
15 what --

16 MS. MOSSMAN: He exposed --

17 QUESTION: -- at what point in time?

18 MS. MOSSMAN: He exposed his prior convictions
19 to his attorney. This is what brought this -- Mr. Benitez
20 to confusion, and this was articulated in -- in the
21 sentencing transcript.

22 QUESTION: Which we don't have or do we have it?

23 MS. MOSSMAN: Yes, you do. The sentencing
24 transcript is at joint appendix 104.

25 QUESTION: And could -- could you point to that

1 place where it says that before he made this deal, which
2 invoked the safety valve, he had told his counsel that I
3 have three --

4 MS. MOSSMAN: It's at -- Justice Ginsburg, it's
5 at page 109. If I may read for the Court.

6 QUESTION: Yes.

7 MS. MOSSMAN: The Defendant: I never felt that
8 I had the proper representation, the way it should have
9 been in my case.

10 From the beginning, I never had any knowledge
11 about the points of responsibility, the safety valve, or
12 anything like that. I honestly, from the beginning, I
13 accepted through my -- responsibility through my attorney,
14 but he never paid any attention to me, what I had told him
15 about the problem that I had. I told him from the
16 beginning that I had a problem, that I was attending the
17 program. And at the end, he told me that I -- allegedly
18 that I had never told him, that I had never notified him
19 of it.

20 I never hid anything in my case about the things
21 that I have done. Everything I said -- I have said --
22 everything I said -- I have said has always been the truth
23 and the reasons why I did it. And I have always asked for
24 another chance. I've always asked him for an opportunity
25 to meet with the government and he never wanted me to do

1 that.

2 QUESTION: I don't see where he said, I told my
3 lawyer that I had three prior convictions.

4 MS. MOSSMAN: He's trying to say, Justice
5 Ginsburg, that I never hid anything and then -- from my
6 attorney about this case.

7 And then the -- the judge goes on to question
8 him.

9 QUESTION: Well, that's all right. I don't want
10 to intrude on -- on your time.

11 MS. MOSSMAN: It's -- I -- I think it's on page
12 110.

13 So what you're -- the Court: So what you're
14 indicating you believe everyone knew about your criminal
15 history. Is that what you're saying?

16 The Defendant: Well, from the very beginning
17 when he went -- when he came to see me, I explained it to
18 him.

19 The Court: I understand.

20 So what you're indicating to me is that you
21 believe from the beginning you had disclosed that you had
22 a criminal record. Is that right?

23 The Defendant: Yes.

24 So he --

25 QUESTION: And the trial judge told him, you

1 know, if you don't qualify, I might give you 10 years. Do
2 you understand that? And he says, yes.

3 MS. MOSSMAN: Yes.

4 QUESTION: And he says, knowing you have a
5 mandatory minimum, I have to give you 10 years. Do you
6 still want to go forward with your plea? He says, yes.

7 MS. MOSSMAN: Yes, correct, but this --

8 QUESTION: So it's pretty hard to argue that --
9 I mean -- go ahead.

10 MS. MOSSMAN: Justice Breyer, but this defendant
11 -- it's not clear that he did not know that he could not
12 withdraw his plea. He was under the impression, which is
13 common sense impression, that he -- if -- if he doesn't
14 get the sentence that he -- that he asked for, he could
15 withdraw his plea.

16 QUESTION: Well, how -- how could he have had
17 that when the thing in the plea agreement itself was
18 explained to him in Spanish saying that he couldn't?

19 MS. MOSSMAN: Mr. Chief Justice, our contention
20 is that the -- the fact that the plea agreement wasn't in
21 Spanish is fatal here because his attorney couldn't speak
22 Spanish.

23 QUESTION: Well, but there was an interpreter
24 there.

25 MS. MOSSMAN: But his -- his attorney didn't --

1 if his attorney couldn't speak Spanish, he doesn't know
2 exactly what the interpreter is saying.

3 QUESTION: Well, the interpreter can presumably
4 speak English.

5 MS. MOSSMAN: The -- well, there was a
6 contention here between the defendant and his counsel in
7 numerous instances before the court. He expressed to the
8 court that he couldn't communicate with his attorney and
9 the prosecution knew about this. They also characterized
10 the case as -- under paralysis, and yet they still gave
11 this defendant --

12 QUESTION: This is new to me. I -- I didn't see
13 any -- any indication in your briefs or in the record that
14 he claims he was never told by the interpreter. I thought
15 it was -- I thought it was common ground that the
16 interpreter had correctly explained the written plea
17 agreement to him. You're now saying that he contends that
18 he was deceived as to the meaning of the plea agreement?

19 MS. MOSSMAN: No, Justice Scalia, we're not
20 contending that, but we agree with the Ninth Circuit that
21 the plea agreement in and of itself in -- in this case is
22 not conclusive of understanding.

23 QUESTION: Because? Because? Because the plea
24 agreement was read to him in Spanish. Is that right?

25 MS. MOSSMAN: That's part of it, Justice Breyer,

1 yes.

2 QUESTION: That is right.

3 MS. MOSSMAN: Yes, but also --

4 QUESTION: All right. The plea -- so he hears
5 in Spanish someone read to him the words, you cannot
6 withdraw your plea agreement -- cannot withdraw if they
7 don't accept it. And that's conceded in this case. Is
8 that right?

9 MS. MOSSMAN: Yes, it -- this was --

10 QUESTION: Okay.

11 Then afterwards the judge tells him, in
12 addition, if -- has anyone explained to you that -- do you
13 understand that if you -- that if you don't qualify for
14 the safety valve, you go for 10 years. `Yes.

15 Has anyone promised you you will qualify for the
16 safety valve? No.

17 So you realize you could get 10 years. Yes.

18 All right? Knowing that, you still want to go
19 ahead with your guilty plea? Yes.

20 MS. MOSSMAN: Our -- Justice Breyer, our
21 position is consistent with the Ninth Circuit that he was
22 under an expectation, a highly -- a highly -- high
23 expectation that he would -- would get the safety valve,
24 and like the Ninth Circuit said, he had no incentive to
25 read or double check the provisions within the plea

1 agreement himself. And this -- this --

2 QUESTION: I thought one -- one of your points
3 was that this was a rather long agreement and this was
4 paragraph 19.

5 MS. MOSSMAN: Yes, Justice Ginsburg, that was
6 going to be my next point. This provision was buried in
7 the plea agreement and one doesn't know, because his
8 counsel couldn't -- doesn't speak Spanish. If he -- if
9 the -- if the interpreter inadvertently misstated that
10 provision --

11 QUESTION: I -- I didn't know that you were
12 claiming that this hadn't been an accurate translation.

13 MS. MOSSMAN: We --

14 QUESTION: I thought your -- your point was that
15 it was a lot to absorb without having a written copy to
16 follow.

17 MS. MOSSMAN: In our -- Justice Ginsburg, in our
18 opposition to the petition for writ of certiorari, we --
19 we claimed that that point, that -- that we have no
20 certainty because there was not a transcript of the
21 Spanish interpretation.

22 QUESTION: Did you claim that before the Ninth
23 Circuit?

24 MS. MOSSMAN: Yes, Mr. Chief Justice.

25 QUESTION: Did the Ninth -- did the opinion

1 reflect that at all in the Ninth Circuit?

2 MS. MOSSMAN: Yes.

3 QUESTION: That -- that you said that it was a
4 not a correct translation?

5 MS. MOSSMAN: They -- yes --

6 QUESTION: Did it or did it not?

7 MS. MOSSMAN: Yes.

8 QUESTION: Whereabouts?

9 MS. MOSSMAN: I can read -- excuse me, if I may
10 correct myself, Mr. Chief Justice.

11 QUESTION: Yes, please do.

12 MS. MOSSMAN: They didn't say that it was not a
13 correct translation, but they did hold it as not
14 conclusive. And they state that in their decision when
15 they say that Mr. --

16 QUESTION: Well, finish. Go ahead. Finish the
17 rest of your argument.

18 MS. MOSSMAN: Just move on?

19 QUESTION: Yes, please.

20 MS. MOSSMAN: Okay.

21 I'd just like to say that the Government's
22 burden is -- the Government's test, the prejudice test,
23 the but-for test, is asking this defendant to go back in
24 time and to prove a counter-factual. It's not in this
25 record, that if not for the error, he would not have pled

1 guilty. That's a very heavy burden here. And we believe
2 it emasculates the knowing requirements and makes
3 awareness of the consequences of the plea irrelevant. And
4 the -- a defendant, if he does not understand the scope of
5 the prosecution's promise, he cannot evaluate the risks
6 inherent in the type of plea agreement that he's signing.
7 We think that's critical. The Ninth Circuit agreed that
8 -- that the rule 11(e)(2) warning and the type of plea
9 agreement that this particular defendant entered into is
10 highly critical and affords a higher risk to this
11 defendant because it couldn't withdraw. And it's
12 counterintuitive to enter into an agreement when you
13 understand that one party could withdraw, to think that
14 you can't.

15 That's why the Congress has asked -- has asked
16 that this warning be expressly made in the rule 11
17 colloquy, that if we -- if I -- I -- I'm not bound by the
18 recommendation. The judge has said I'm not bound by the
19 recommendations, but you cannot withdraw if I do not give
20 you the sentence that you bargained for because that's a
21 counterintuitive understanding. I believe Justice Scalia
22 was getting at this when he talked to Mr. Himmelfarb.

23 And in closing, I'd just like to say this Court
24 should adhere to the Olano prejudice test and reject the
25 Government's invitation to adopt a but-for, highly

1 prejudiced, highly burden -- excuse me -- strict bright
2 line ruling test. And this Court should affirm the Ninth
3 Circuit's result, but if they do not --

4 QUESTION: Thank you, Ms. Mossman.

5 Mr. Himmelfarb, you have 5 minutes remaining.

6 REBUTTAL ARGUMENT OF DAN HIMMELFARB

7 ON BEHALF OF THE PETITIONER

8 MR. HIMMELFARB: Unless there are further
9 questions, we'll waive rebuttal.

10 QUESTION: Well, I do have a question. I -- I
11 think that her strongest point there is that he said in
12 the later sentencing hearing that he told his lawyer about
13 the priors. Now, if that's true, the lawyer would have
14 known immediately he couldn't qualify for the safety valve
15 and would have told him this whole agreement is a joke
16 because the judge doesn't have the power to give you
17 anything less than 10 years.

18 So if -- if that's true, she must have some kind
19 of a claim.

20 MR. HIMMELFARB: He may have an ineffective
21 assistance of counsel claim --

22 QUESTION: An ineffective assistance claim.

23 MR. HIMMELFARB: -- Justice Breyer, which he
24 would be -- which he would have to raise in a 2255
25 proceeding. But the plain error rule should not be used

1 to deal with that type of problem.

2 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
3 Himmelfarb.

4 The case is submitted.

5 (Whereupon, at 11:02 a.m., the case in the
6 above-entitled matter was submitted.)

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